# The Speech

OF

## Mr. SERJEANT MEREWETHER,

IN THE COURT OF CHANCERY,

SATURDAY, DECEMBER 8, 1849,

UPON THE CLAIM OF THE

## COMMISSIONERS OF WOODS AND FORESTS

TO THE

# SEA-SHORE,

AND THE SOIL AND BED OF

## Tidal Harbours and Navigable Rivers;

THE NATURE AND EXTENT OF THE CLAIM,

AND ITS EFFECT UPON SUCH PROPERTY.

*The Commissioners of the Woods and Forests assert that—*

" By the Royal prerogative the ground and soil of the Coast and Shores of
" the Sea round this Kingdom, and the ground and soil of every Port,
" Haven and Arm of the Sea, Creek, Pool, and navigable River thereof, into
" which the Sea ebbs and flows, and also the Shore lying between high-
" water mark and low-water mark, belong to Her Majesty."

EXTRACT, *from the Information filed by the Attorney-General.*

LONDON:

HENRY BUTTERWORTH, 7, FLEET STREET,

Law Bookseller and Publisher.

HODGES AND SMITH, GRAFTON STREET, DUBLIN.

1850.

# Law Books

PUBLISHED BY

## HENRY BUTTERWORTH.

### Scriven on Copyholds.—Fourth Edition.

2 vols. royal 8vo, price £2 : 10*s.* boards.

A TREATISE on COPYHOLD, CUSTOMARY FREEHOLD, and ANCIENT DEMESNE TENURE; with the Jurisdiction of Courts Baron and Courts Leet; also an Appendix containing Rules for holding Customary Courts, Courts Baron and Courts Leet, Forms of Court Rolls, Deputations, and Copyhold Assurances, and Extracts from the relative Acts of Parliament. By JOHN SCRIVEN, Serjeant at Law. THE FOURTH EDITION, embracing all the authorities to the present period, by HENRY STALMAN, Esq., of the Inner Temple, Barrister at Law.

---

### Ayckbourn's Chancery Practice.—Third Edition.

12mo, price 16*s.* boards.

THE NEW CHANCERY PRACTICE; comprising all the Alterations effected by the RECENT ORDERS AND STATUTES; with Practical Directions, a Copious Selection of Modern Cases, and an APPENDIX OF FORMS. By HUBERT AYCKBOURN. THIRD EDITION, enlarged and carefully revised, By THOMAS H. AYCKBOURN, Esq., of the Middle Temple, Barrister at Law, and HUBERT AYCKBOURN.

"That which Archbold is to Common Law Practice, Ayckbourn is to that of Chancery. The one work is quite as indispensable as the other. The present edition of Ayckbourn is a decided improvement on the former one."—*Law Magazine.*

*** *A Volume of QUESTIONS for LAW STUDENTS on the above Work is in preparation.*

---

### Crabb's Precedents in Conveyancing.—Third Edition.

2 thick vols. royal 8vo, price £3 boards.

A COMPLETE SERIES of PRECEDENTS IN CONVEYANCING and of COMMON and COMMERCIAL FORMS, in Alphabetical Order, adapted to the Present State of the Law and Practice of Conveyancing, with copious Prefaces, Observations, and Practical Notes on the several Deeds. To which are added the late Real Property Acts, with Notes, and the Decisions thereon. THE THIRD EDITION, revised and greatly enlarged. By GEORGE CRABB, Esq., of the Inner Temple, Barrister at Law.

*** *This Work, which embraces both the Principles and Practice of Conveyancing, contains likewise every description of Instrument wanted for Commercial purposes.*

"Crabb's Precedents are already well known to the profession. Two editions have exhausted in a very short period, a decisive proof of the estimation in which they eld, and how useful and satifactory they have been found in practice."—*Law*

# The Speech

OF

## Mr. SERJEANT MEREWETHER,

IN THE COURT OF CHANCERY,

SATURDAY, DECEMBER 8, 1849,

UPON THE CLAIM OF THE

## COMMISSIONERS OF WOODS AND FORESTS

TO THE

# SEA-SHORE,

AND THE SOIL AND BED OF

## Tidal Harbours and Navigable Rivers;

THE NATURE AND EXTENT OF THE CLAIM,

AND ITS EFFECT UPON SUCH PROPERTY.

*The Commissioners of the Woods and Forests assert that—*

"By the Royal prerogative the ground and soil of the Coast and Shores of "the Sea round this Kingdom, and the ground and soil of every Port, "Haven and Arm of the Sea, Creek, Pool, and navigable River thereof, into "which the Sea ebbs and flows, and also the Shore lying between high-"water mark and low-water mark, belong to Her Majesty."

EXTRACT, *from the Information filed by the Attorney-General.*

LONDON:

HENRY BUTTERWORTH, 7, FLEET STREET,

Law Bookseller and Publisher.

HODGES AND SMITH, GRAFTON STREET, DUBLIN.

1850.

PRINTED BY RICHARD AND JOHN E. TAYLOR,
RED LION COURT, FLEET STREET.

THE ATTORNEY-GENERAL

*against*

THE MAYOR AND CORPORATION OF THE CITY OF LONDON.

---

*Mr. Serjeant Merewether.*—My Lord, Mr. Bethell having so forcibly and conclusively stated to your Lordship the grounds upon which he apprehends that this Judgment is erroneous*, and having also stated so very distinctly the manner in which the present question comes before your Lordship, it will relieve me from addressing my arguments to any point but that which he has left to me. I will therefore confine myself to the discussion of the proposition to which Mr. Bethell last referred, and which is contained in the information; that "by the Royal prerogative the ground and soil of the "Coast and Shores of the Sea round this Kingdom, and the "ground and soil of every Port, Haven and Arm of the Sea, "Creek, Pool, and navigable River thereof, into which the Sea "ebbs and flows, and also the Shore lying between high-water "mark and low-water mark, belong to Her Majesty:" and it will be my duty to submit to your Lordship the authorities, which I think will be abundantly satisfactory, to show that that proposition cannot be supported.

I am not insensible to the difficulty which I have to

* The Judgment was by the Master of the Rolls, confirming the Master's Report, in support of exceptions to the Answers of the Defendants.

meet in discussing that proposition; because I am fain to admit that it has been asserted again and again; nor could I for one moment fail to allow, that learned Judges upon the Bench have asserted it; but in all instances merely as *obiter dicta*; and I will venture to say that on no occasion has that proposition been supported by any legal decision. My Lord, I am also of course aware that I am attempting to support a negative proposition—a difficult task at all times—but the difficulty of which is greatly removed by the consideration, that if this opinion, though so long entertained, is wrong, it must be abandoned. My Lord, I am much encouraged in the attempt by what took place a few years ago in the Court of Exchequer, in which a deep-rooted practice in *pleading* (the very marrow of the law) was terminated, after it had been acted upon for a period of 200 years:—the right reason and the common sense of the case required that it should be overruled, and the learned Judges who presided in that case, recognizing nevertheless that it had been adopted for so many years,—recognizing nevertheless that they had themselves been most strongly inclined to adopt it as a rule of practice, having in the first instance called upon Mr. Serjeant Manning, who had to support the plea, to defend it; thinking that it was not necessary even to hear the other side: yet after full discussion, in the case of Bodenham *v.* Hill, it was expressly decided upon the plea of the Statute of Limitations, which, though in the negative, had always been pleaded with a verification, that prayer of judgment was the proper form, and the Court set aside the practice, though so long pursued. My Lord, I must say also that I cannot help bearing in mind the observation, so sound and cogent, made by Lord Denman, that "a large portion of that legal opinion, which has "passed current for law, falls within the description of law "*taken for granted**." There are undoubtedly many points, turning upon minute and careful investigation of the foundation of the English law, which are taken, too hastily, for granted.

* Reg. *v.* O'Connell and others, 12 Clark and Finnelly.

My Lord, out of respect to your Lordship,—and to this general opinion which has been so long entertained—and more especially out of respect to those learned Judges who have adopted it, I have not ventured hastily upon the denial of this proposition; but I have felt it my duty to look fully into all the cases, and authorities, and documents, which can bear upon the subject:—and I will now, my Lord, with as much brevity as I can, lay before your Lordship those authorities I have looked into and examined, and which have led me to the conclusion that I trust I shall be able to maintain before your Lordship.

It will be familiar to your Lordship that there are no records of any kind in this country from which we can expect to derive any certain information, and still less any information upon such a subject as is now submitted to your Lordship, earlier than the Saxon period of our history; and your Lordship is probably aware that very lately a large collection of the charters of that time has been made by Mr. Kemble, with extreme assiduity, including many hundred charters of the Saxon period; and of course, when venturing to deny a proposition of law of this extent, spreading all round the kingdom, such documents ought to be examined, to see if there were any trace of any right of this kind existing in the Crown; or anything from which it might be inferred.

Saxon Charters.

*Lord Chancellor.*—Do I understand that the answer of the Corporation of London denies the right in the Crown?

*Mr. Solicitor-General.*—No, my Lord, it leaves it in obscurity, how they derive their title.

*Mr. Serjeant Merewether.*—The question is, whether the soil and bed of the river belong to the Crown.

*Mr. Randall.*—It does not, my Lord, admit a right in the Crown, but asserts an immemorial title in the Corporation.

*Mr. Solicitor-General.*—They neither admit it nor deny it; they leave it in obscurity.

*Mr. Serjeant Merewether.*—Your Lordship will observe

# The Speech

OF

## Mr. SERJEANT MEREWETHER,

IN THE COURT OF CHANCERY,

SATURDAY, DECEMBER 8, 1849,

UPON THE CLAIM OF THE

## COMMISSIONERS OF WOODS AND FORESTS

TO THE

# SEA-SHORE,

AND THE SOIL AND BED OF

## Tidal Harbours and Navigable Rivers;

THE NATURE AND EXTENT OF THE CLAIM,

AND ITS EFFECT UPON SUCH PROPERTY.

*The Commissioners of the Woods and Forests assert that—*

"By the Royal prerogative the ground and soil of the Coast and Shores of "the Sea round this Kingdom, and the ground and soil of every Port, "Haven and Arm of the Sea, Creek, Pool, and navigable River thereof, into "which the Sea ebbs and flows, and also the Shore lying between high-"water mark and low-water mark, belong to Her Majesty."

EXTRACT, *from the Information filed by the Attorney-General.*

LONDON:

HENRY BUTTERWORTH, 7, FLEET STREET,

Law Bookseller and Publisher.

HODGES AND SMITH, GRAFTON STREET, DUBLIN.

1850.

" sea has always flowed and reflowed; and that the said river " is and has been from time immemorial an ancient and na- " vigable river and king's-highway for all persons, with their " ships, vessels, boats and craft, to pass and repass and na- " vigate, at their free will and pleasure, and to moor their " vessels in convenient parts of the said river, not impeding " the navigation thereof, subject to such regulations as De- " fendants, within the limits of their rights of ownership, " have from time to time prescribed."

*Mr. Serjeant Merewether.*—My Lord, I imagine that that is a direct denial of the principle of law which is laid down in the information; and when my learned friend, the Solicitor-General, says that we should plead issuably upon that point, it is not an issuable fact, but a proposition of law, upon which the title of the Crown rests; and if that is not maintainable, they have no right to ask for a discovery in this respect. As far as the conservancy is concerned, that is a matter of jurisdiction,—a matter derived from the Crown as the fountain of justice.

*Lord Chancellor.*—I think the exception rests upon the title to the bed of the river.

*Mr. Serjeant Merewether.*—Exactly so; we have fully answered as to the conservancy; the only point is, that we have not answered as to the soil and bed of the river; to which my answer is, that we are not called upon to do so.

My Lord, I was observing that in these most valuable documents—I shall pass over many shortly—because my object will rather be to draw your Lordship's attention to them than to enforce them by any laboured argument;—for I am confident that the result of their mere enumeration will be, that there is no foundation for the proposition of law now asserted—I was saying that in these numerous documents there is no trace whatever of any such prerogative in the Crown; there are, on the contrary, traces of a *territorial right* to the sea-shore as belonging to the lands adjoining; there are grants of charters giving in express words the sea-

Saxon charters.

shore, and salt marshes, and other things of the same kind, existing upon the sea-shore as *appurtenant* to the lands granted by the charters.

*Lord Chancellor.*—Accompanying the grant of the lands?

*Mr. Serjeant Merewether.*—Accompanying the grant of the lands, and amongst the appurtenances. From the earliest times it appears to have been a part of the land, and passing with the land, and adjunctive to the land; and there is no prerogative right of the Crown as interposing between the sea and the owner of the adjoining land.

My Lord, the next documents, which will be familiar to your Lordship, will be the Saxon laws, in which the rights and prerogatives of the Crown are alluded to—Theftbote, Treasure-trove, and other rights of that description; but there is no reference whatever to such a prerogative right as the one now claimed. Saxon laws

I ought here to draw your Lordship's attention to the extent to which this right would extend if it could be established: and the value of property of that description at that period, when the knowledge of machinery not being so advanced as at present, mills were chiefly upon the sea-shore: and fish were ordinarily caught by weirs upon the banks of rivers and on the shores of the sea: and when salt was obtained by a mode now almost in disuse—those things at that period were of great value.

The next document to which I shall claim your Lordship's attention will be one to show that such a right as this now insisted upon could hardly by possibility have existed. I allude to that great fiscal document the *Domesday Book*. Your Lordship is well aware that there all the land of the Crown is set out. The *Terra Regis* precedes the entry of the general property in each county; but there is no trace in that document, from the beginning to the end, of any such right belonging to the King. On the contrary, in the first page of the book there is mention of a tide-mill at Dover in the possession of the Bishop of Baieux: so that not only is that document totally silent as to any such right of the Crown, but Domesday.

in the instance to which I have referred, as well as in many others where salt-pans and places on the sea-shore are referred to, they are treated as belonging to the owners of the adjoining land, and not to the Crown.

Laws of William the Conqueror & Henry I.

One word will dispose of the next document, the laws of William the Conqueror, as well as those of Henry I.: they also are like the Saxon laws: there are prerogatives of the Crown alluded to, but no reference whatever to any peculiar right in the Crown to the sea-shore.

Glanville.

I would not willingly pass by any of the books most known as the earliest text-books in our law, and the next authority in order of time is Glanville. As your Lordship will probably be aware, that author has a passage expressly upon *Purprestures*, being encroachments upon the Crown or the public, which, when proved, subject the land to forfeiture. That matter is mentioned in Glanville; but from the beginning of the book to the end, and in the *Regiam Majestatem*, (a work I believe nearly *verbatim* the same,) there is not, in the one nor in the other, the slightest reference to the prerogative of the Crown as affecting the sea-shore.

Magna Charta.

In order of time, *Magna Charta* will be the next document to which I shall draw your Lordship's attention. The first charter of King John mentions nothing with regard to the sea-shores; but it is a curious fact, that in the second charter, that of Henry III., an exception as to the sea-shores is introduced; for in that charter, which speaks of the destruction of Kidells and Weirs upon the rivers, there is an express exception "*nisi per costeram maris*:" so that kidells are not to be removed from the sea-shore. It appears to me, my Lord, that it is impossible to doubt that the exception was introduced for the protection of those owners upon the sea-shore who had weirs there; that weirs in the rivers were necessary to be removed with a view to their free navigation, but that they were not equally so on the sea-shores: and as it has been laid down, that supposing there were an Act of Parliament which required the removal of weirs, it would not operate upon weirs belonging to the King; so this excep-

tion seems to be solely for the protection of those rights on the sea-shore which the owners of the adjoining land at that time possessed, and which are so recognized in this great charter.

*De Jure Maris.*

I have now to advert to a treatise which I am well aware has led to much of the misconception respecting this supposed principle of law. It is a treatise, familiarly called Lord Hale's: but I have every reason for thinking, as far as regards the book published by Mr. Hargrave, that it is not Lord Hale's—at least I would venture so far to say, that there is no sound reason for assuming that it is. I have looked at the manuscript in the British Museum; the writing is beyond all question not Lord Hale's; it is the writing of a clerk, evidently copied from some book or work; and there is nothing in it to show that it is Lord Hale's, excepting that in one corner of the first leaf there is put at the top "Chief Jus-"tice Hale," but in a modern handwriting. That Mr. Hargrave had no information that it was Lord Hale's—and that he himself was scarcely satisfied that it was so—seems to be pretty plain; because, for his authority that it is Lord Hale's, he refers only to an observation of Sir Thomas Parker, in his reports, quoting "a manuscript of Lord Hale's," which Mr. Hargrave assumes to be this—"De Jure Maris." But, my Lord, when that matter is investigated, it will be found that in the British Museum there is another manuscript, in Lord Hale's handwriting, and which is probably the one alluded to by Sir Thomas Parker; Mr. Hargrave therefore himself seems rather to have proceeded upon that imperfect evidence than any precise knowledge of his own. And I say this, my Lord, because it will be a matter of considerable importance whether this is really a work of Lord Hale's or not; and I cannot help thinking, that out of regard to the character of that very learned Judge, the proper conclusion is that it is *not*; on account of the apparent contradictions and inaccuracies which are to be met with on the face of the treatise itself. Therefore as an authority I imagine it cannot be relied upon, though it has been hitherto treated as a book of authority. In a future

stage of the observations which I have to make, I shall state to your Lordship how it ought to be treated as bearing upon this point. At present I am only, in the course of the argument, treating the records quoted in it chronologically, in which manner alone I imagine that these authorities and documents can be made to explain each other and be rendered intelligible.

Henry III. I am about to draw your Lordship's attention to the *Shinberge* case* which relates to the river *Severn*, and is mentioned in that treatise. In other parts of this work it is assumed that when the sea once flows over land (and I am sorry to say that view seems to have been entertained and acted upon Hastings. lately in a case near *Hastings*), such land belongs to the King. The river of Severn had gained upon Shinbridge, so much so that its channel ran over part of Shinbridge lands, and had lost part thereof unto the other side, though it was afterwards thrown back again to Shinberge; the decision was, "It shall "not belong to Aure" (the opposite village); "neither was it at "all claimed by the King, though Severn in that place is an "arm of the sea." Now the proposition in this information is that an arm of the sea, the shores and all belonging to an arm of the sea, are the property of the Crown. It appears to me that this doctrine was at least denied in that case in the reign of King Henry III. I shall have occasion also afterwards to draw your Lordship's attention to another case much of the same kind, commonly called Lord Barclay's case, which arose upon the same river a little higher up.

Bracton, Fleta, Britton. The next books of authority in our law which might be consulted upon this subject are, Bracton, Fleta, and Britton. Now *Bracton* is often quoted upon this subject; but there is no authority whatever in Bracton, my Lord, to support this prerogative of the Crown. There is a learned disquisition as to the right to property acquired by occupancy, and as a portion of that branch of the inquiry, the cases of *alluvion* upon the sea-shore are referred to. But I am quite satisfied that your Lordship will see at once that no doctrine

* Treatise De Jure Maris, p. 16.

of alluvion can be used for the purpose of showing that the whole of the sea-shore is vested in the Crown; because alluvion is founded in point of fact upon the *absence* of any occupation in anybody else, and the burthen of proof by the doctrine of alluvion is rather thrown upon the Crown than upon the subject; contrary to the proceedings which are meditated in this case, the burthen of proof is there thrown upon the Crown, because the doctrine of alluvion is this: that if there is land which grows on, as it were, from the sea to other land, the owner of the adjoining land shall have it, unless it can be shown by metes and bounds that it does not belong to his land; and then it belongs to the Crown by the most obvious title, which I readily admit, namely *occupancy*, where there is no other occupant; it being the clear and undoubted prerogative of the Crown that it has a special right to all that which is not in the occupation of anybody else—as wreck, waifes, estrays, &c.*

And perhaps here I may draw your Lordship's attention to that part of the proposition in the information which Mr. Bethell adverted to, namely the additional allegation that the King has the right of government and dominion over the sea-shore. I may certainly clear my argument from all consideration of that kind; I of course am not denying that the Crown has *dominion and government* over the soil of the sea-shore—there is no doubt of that—neither am I in any degree denying that the Crown has *jurisdiction* over the sea-shore; by the Court of Admiralty, when it is covered by water, and by the common law when it assumes again the state of dry land. But none of these go in the slightest degree to show—on the other hand there is rather a contrary inference—that the Crown has any private property in the shore: a *jus privatum* in the shore is that which is set up by the Crown, and that is the only doctrine which I am combating: therefore, admitting the government—admitting the jurisdiction—admitting the right where there is no special occupant—I am contending that in all other cases the occu-

* Woodward *v.* Fox.—2 Ventris.

pation and possession of the shore is so necessary to, and is so generally used and enjoyed by the owners of the adjoining land, that there is no pretence to any right in the Crown *preventing* that occupation. The occupation of the sea-shore may be slight in point of evidence, I admit; perhaps it may be only the straying of cattle—perhaps it may be only for the purpose of taking advantage of the sea adjoining—embarking and disembarking: and therefore, the acts of occupation shown, may perhaps be few; but it will be familiar to your Lordship's mind that there is a case much stronger than that in which the Crown has not the possession nor the right to the soil; although the soil is called the King's soil, and although the owner of the adjoining land would seem, by the acts which he has done, to have excluded himself from possession of it. I am alluding to the case of *Highways*. It has been said, indeed, that the sea-shore is the King's highway; it may be so called, and highways are so called;—but though the highway is generally separated from the lands of the owner by a hedge and ditch set up by his own act, and therefore he would seem to be limiting his property by making that boundary, yet your Lordship is well aware that it is the familiar law of the land that the soil of the highway is the property of the owners of the adjoining lands on each side; and therefore though as in a case of that kind, where there seems to be a strong inference to the contrary, yet the occupation of the owner of the adjoining land is still held sufficient, by presumption of law, to entitle him to the land of half the highway; so I say in the case of the sea-shore, where the occupation is more frequent, but perhaps difficult of direct proof, the legal inference is the same.

I was drawing your Lordship's attention to the case of *alluvion* which is referred to in Bracton, and Fleta who
Britton. follows Bracton. *Britton*, who is an authority of rather a different description, and seems more conversant with the principles of the English law than either of the other writers, who chiefly founded themselves upon the Civil Laws; Britton lays down the thing most strongly; even in some degree con-

trary to the doctrine of non-occupancy, which I was referring to before; for having first of all stated the case of alluvion, he says, "that if any isle rises in the sea, it becomes the property "of the lord of the adjoining manor." That seems to be an accidental property, attracted as it were to the adjoining manor in consequence of its adjacency to it, and where of course it would be under such circumstances much more difficult for the owner of that manor to show any right to it;—but that doctrine is there so expressly laid down.

Then, analogous to the Domesday Book, to which I before drew your Lordship's attention, there is a statute of the realm which gives an account of rights belonging to manors and others—the statute of *Extenta Manerii*, the 4 Edw. I., with the detail of the enumeration of which I will not trouble your Lordship; it is sufficient to say, that almost every species of right connected with manors that has any separate character, is enumerated. The statute is entitled *Extenta Manerii*, 4 Edw. I. chap. 1. It is "a survey of the "buildings, lands, commons, parks, woods, tenants, &c. of the "manor, &c." They are required to make "certain returns "of the buildings, demesnes, parks, woods, pawnage, herbage, "mills, and fishings, and of freeholders and their lands and "tenements, and customary tenants and the lands they hold—"of forests and their profits—and of fairs, markets, and the "liberties, customs, and services"—in short, every separate thing which could possibly belong to a manor. But there is no mention there whatever of the sea-shore as having any peculiar quality, or anything which would lead to its being held separately in any degree either by the Crown or the lord of the manor; or anything in point of fact which could induce any person to suppose that there was in that period of our law, any peculiar or mystical right connected with the shore of the sea, otherwise than as a part of the adjoining land.

4 Edw. I. *Extenta Manerii.*

In the treatise to which I have before adverted, there is the *Toppesham* case*, to which, with many others, I would draw your Lordship's attention, for the purpose of

Toppesham.

* De Jure Maris, pp. 20 and 55.

showing how the sea-shore, and the ports, and the navigable rivers, were treated as belonging to private individuals. In that case, "The Earls of Devon," in the 12 Edw. I., "had not "only the port of Toppesham (*de quo infra*), but the Record tells "us that *portus et piscaria et mariscus de Topsham spectat* "*Amiciæ Comitissæ* Devon." And the same treatise quotes it again at a subsequent period:—"The port and the fishing "and the marsh of Toppesham belonged to the Countess of "Devon." It appears that there was a contest between the Countess of Devon and the mayor and burgesses of Exeter, who had the port of Exeter in fee farm, and eventually the Countess succeeds and the corporation are defeated. That, your Lordship observes, was a litigation between the Countess of Devon on the one part and the corporation of Exeter on the other; there was no interposition of the Crown.

*Lord Chancellor.*—Both might have claimed under the Crown.

*Mr. Serjeant Merewether.*—Yes, my Lord, I will not at all deny that they might have claimed under the Crown; they might have been grantees of the Crown both of the borough and town of Toppesham, and of the river, to hold under the Crown, (of which there are many other instances, but as grantees of the private property of the Crown) not of any distinct prerogative right,—but as part of the land—part and parcel of the borough or town.

*Lord Chancellor.*—"Fee farm:" still somebody else was the original proprietor.

*Mr. Serjeant Merewether.*—Certainly, my Lord, it might have been held under the Crown; but whether *jure privato* or *jure prerogativo* is the point; there seems no pretence for the latter.

*Lord Chancellor.*—The fact of there being a contest between the Corporation and an individual, does not show that the Crown had not the original title.

*Mr. Serjeant Merewether.*—No, my Lord; but I think your Lordship will see that if the Crown had had any title, it would have interposed, as was the practice in those days.

In the twentieth page of the same treatise, my Lord, there is another authority quoted—the case of the Abbot of Tichfend—who "impleaded the burgesses of Southampton that "they had taken up their weir at Cadeland. The burgesses "replied that the weir was placed there to the injury of our "Lord the King and the town of Southampton, and the ships "and boats were impeded by which they could the less come "to the port. The Jurors say that from time whereof the "memory of man runneth not to the contrary there was not "any weir there, so that it was to the injury of those passing "by." Tichfend.

Now upon this the author of this treatise observes, "That "a subject *may* by prescription have a weir in the sea; and "consequently have an interest below the low-water mark, for "probably weirs be such." I draw your Lordship's attention to that point, because it establishes that the right of the owners of the adjoining land is not limited, as is ordinarily conceived, to the low-water mark. I should contend that it goes further; that in point of fact *the owner of the adjoining land is entitled to go to the sea, wherever it may be; to follow it as it recedes; and that his enjoyment is as far as he can make the sea capable of his occupation, and that as well by weirs as by projections, which have from time immemorial been made all round this kingdom by the owners of the adjoining lands, who use the sea to the utmost point that they can make it available for their purposes.*

In the same reign there was a case of considerable importance, against the Prior of Tinmouth:—there the Attorney of His Majesty claimed for the King that river, *eò quod fluxu maris comprehenditur*. The judgment was signed against the Prior; and the treatise assumes that it was impliedly with respect to the soil. But if the case is looked at, my Lord, there is no pretence for supposing that to be the case—it was founded solely upon the ground of nuisance. The complaint was that the ships were impeded in their navigation; and another complaint was that the Prior had set up a market contrary to the interests of the town of Newcastle:—it being clear by law, Tinmouth case.

that no nuisance can be permitted to exist; and no market can by law be set up within seven miles of any existing market. It is therefore obvious that there was abundant ground for that judgment without its being taken that it impliedly affected the right to the soil.

Edw. I. At the end of the reign of Edward I. and at the commencement of the reign of Edward II. began that compilation of decided cases which will be familiar to your Lordship—I mean Year Books. the Year Books. Those books date from that period up to the reign of Henry VIII. In them are recorded almost every question which by possibility could arise in the administration of the law:—and yet after the best search which I have been able to make in them, I cannot find one case which would give the slightest colour for this right which is now assumed to be in the Crown; and I am confirmed in that conclusion, because in all the *abridgements* which your Lordship is aware collect the cases out of the Year Books—in the early abridgements of *Statham* or *Fitzherbert*—or any of those collections of cases—I cannot find the slightest trace of such a right as this. I am therefore confident that there is not at that period any appearance whatever of such a right in the Crown; and how, my Lord, it could possibly have been omitted to be mentioned, or to be called in question, if put in force, appears to me incredible; because this claim, if it applies to anything, applies to a considerable portion of the area of this sea-girt kingdom.

Statham. Fitzherbert.

I have taken some pains in having the extent of the property claimed measured, as far as it is practicable from maps; and I find it would apply, at the lowest possible calculation, to no less an amount than upwards of 700,000 acres of land. Now that such a claim as this should exist all round the kingdom, and that you should have in succeeding reigns minute records of the points decided in courts of law, and have no trace whatever of such a proposition as this, is to me, I must confess, all but conclusive, that at that time of day such a right never could have existed. My Lord, the Year Books certainly lay a strong foundation for the inference I have drawn, and I

think I shall satisfy your Lordship that there are other authorities leading to precisely the same conclusion.

In the *Rolls of Parliament* it will be found in the 8th of Edward II. that there was, with respect to the manor of *Hacchesham*, a petition presented to the king claiming land which had been overflowed by the sea, and taken by the bishop of Bath and Wells:—to which the answer was, in the language of that day, "*Sequatur versùs Episcopum ad com-*" *munem legem.*" The king directed that it should be decided according to the common law:—and it is justly enough observed in this book, that "that would not have been the case, "if the king had been entitled." That is the language which I find in this treatise, upon which so much reliance is placed in support of this prerogative.

Rolls of Parliament, 8 Edw. II.

Hacchesham.

*Lord Chancellor.*—The only fair inference from that is this, 'you cannot have it by favour;' it entitles you by right and not by favour; it only refuses the favour.

*Mr. Serjeant Merewether.*—My Lord, if it were in the power of the Crown—if the Crown were seised, as it is alleged now to be, by right of prerogative——

*Lord Chancellor.*—Suppose the Crown does not choose to act; it says, Let the law take its course.

*Mr. Serjeant Merewether.*—Which it would have been quite unnecessary for the Crown to have said, if the Crown were in point of fact entitled.

Now here is another case which I will mention to your Lordship. As I am endeavouring to support a negative proposition of this kind, I do not mean to pass by any authority that may appear to impugn the argument I am enforcing. There is undoubtedly an extraordinary case to be met with in this book, and a still more extraordinary conclusion drawn from it—it is the case of the Abbot of St. Benedict Hulme in the 10th of Edward II.:—"He impleads divers "for fishing *in ripariâ suâ* which extends itself from the "Bridge of Wroxham to a certain Lake called Blackdam. "Then the king's attorney came in, and alleged for the king "that the said *riparia* is an arm of the sea. That it extends

Abbot of Hulme, 10 Edw. II.

" itself into the salt sea and is the *riparia* of our lord the " king, where the salt water flows and reflows, and where " ships and boats come and apply themselves from the great " sea to load and unload without paying toll to any one, " and it is a common fishery to every one; and he says " that it was presented in the last *Iter*, before Solomon *de* " *Roffa* and his companions Justices Itinerant in that county, " that the predecessor of the abbot made a *purpresture* upon " the king in the said *riparia*, by placing *weirs* in the same, " and by appropriating to him the same fishing to be held as " if it were several. Upon which it was considered that the " weirs should be amoved, and that the water should remain " a common fishery. And the Attorney-General sought a " stay of proceedings, that they should not take any inquisi- " tion thereon, until the justices were certified upon the " record and the process. Thereupon search is granted, and " the record certified. And afterwards a procedendo was ob- " tained, and issue being joined, it was found for the abbot, " and judgment and execution given against the defendant " for the damages, namely £200." " Upon which record," says the author of this treatise (it can hardly be possible that it should be Lord Hale), " these things are observable— " First, that *de communi jure*, the right of such arms of the " sea belongs to the king." That was the point asserted by the attorney-general; the attorney-general said that he had a record which would support it—and prayed a stay of proceedings till it was examined. It was examined, and the decision was against the effect of the record—they go to issue—and the issue is found for the abbot. How, upon such a case as that, such a conclusion can be drawn, that by common right such an arm of the sea belongs to the king, I must confess I cannot comprehend. And it is upon that passage, my Lord, that this doctrine now rests, as being well-founded: though I believe, when examined, it will turn out to be totally unsustainable. I ought also to observe, upon that case, that the Abbot of Hulme's title was founded upon a grant made to him of the land *cum pertinentibus*; following out the same

course to which I before alluded with respect to the Saxon Charters.

In Easter Term in the 14th of Edward II., there is a case with respect to some boats which had been seized on the river Thames, as being on the shore damage feasant; and it was there stated that "there was no right to land without leave of "the lord within the flux and reflux of the tide." And therefore, that is at least another case in which the soil of the river, within the flux and reflux of the tide, was held to be in the lord, and that those who entered upon it were trespassers. 14 Edw. II.

Now, my Lord, in the 17th of Edward II., there is the statute which is ordinarily called the Statute "*de Prærogativâ "Regis;*" and in that statute there is a full mention of the prerogatives which belong to the king. My Lord, the first chapter of that statute relates to the custody of lands held in capite; the second, to the marriage of wards; the third, to prime seizin; the fourth, to widows dower; the fifth, to coparceners; the sixth, to women marrying within age; and the seventh, to serjeanties. These seven have all been put an end to by the statute of Charles II. The remaining nine (sixteen altogether) relate to different subjects:—the eighth to advowsons; the ninth, to the custody of idiots; the tenth, to the custody of the lands of lunatics; the eleventh, to *wreck of the sea, whales* and *sturgeons*; the twelfth, to the lands of Normans; the thirteenth, to the king's tenants in capite; the fourteenth, to the escheats of bishops' freeholders attainted for felony; the fifteenth, to lands, &c. not to pass from the king but by express words; and the sixteenth, to the goods and lands of felons. Now, my Lord, this is a very considerable enumeration of prerogatives of the Crown. Prerogatives connected with *wrecks* and *royal fish*; but no mention whatever of this alleged prerogative right of the Crown. I shall not at all disguise from your Lordship that it is argued by some, that this statute does not contain all the prerogatives of the Crown. I must confess I am not aware of any that are not contained in it; but it is so said. Neverthe- 17 Edw. II.

less, however strongly that may be asserted, and were it even found that there were two or three insignificant prerogatives of the Crown omitted in that statute, I should submit with confidence to your Lordship that such a right as the one claimed by the Crown—so extensive as I have described it to be—could not by possibility have been omitted in the enumeration of so particularizing a statute, in which the subject-matter of the sea is brought under consideration, by reference to the prerogative of *wreck and royal fish.*

Horne's Myrrour.

I will only observe with respect to 'Horne's Myrrour of 'Justices,' a book of great authority, which has a chapter on the rights of the Crown, that there is there again no trace whatever of this prerogative. And in the next reign (that book being published in the reign of Edward II.), in the reign of Edward III., I find a case which has always been referred to upon this subject, Sir Henry Nevil's case. That is in the Year Book 5 Edw. III. Hil. fol. 11. As to the Year Books, I should however further state, that though they contain cases relative to *wreck* and to other subjects likely to have brought the sea prerogatives of the Crown into discussion, there are none that I can find relating to the sea-shore, further than those to which I shall draw your Lordship's attention. In page 27 of the treatise De Jure Maris it is said:—"Consonant to this is the pleading of Sir Henry "Nevil's case in Rastall's Entries." Sir Henry Nevil prescribed for *wreck* belonging to his manor, and succeeded in establishing that claim; the wreck being (as of course is usually the case) "*projectum super littus maris apud S: infrà* * "*præcinctum manerii sive dominii illius.*" And there, without any express grant of the sea-shore, or anything belonging to it, but under a grant of *wreck within the manor,* it was taken as being within the manor, being found upon the sea-shore. Therefore in that case, as well as two subsequent,—one of Sir *John*; and another of Sir *Henry* Constable,—which I shall refer to hereafter, your Lordship will see that the sea-shore was assumed to be part and parcel of the manor, and

Sir Hen. Nevil's case.

* "Infrà" in the Law Latin of this date means "within."

the property of the owner of the adjoining manor, who had a grant of the wreck *within* his manor.

There is a case, in the same reign, of the Abbot of St. Austin of Canterbury, where there was an inquisition which found "*Quod non est solum nostrum sed solum abbatis:*"—and that was a portion of what had been encroached upon in the creek, in the neighbourhood of Canterbury. Abbot of St. Austin's case.

In the 22 Edw. III., in the *Liber Assisarum*, there is a case which is often quoted—in the Banne Case—and over and over again in several subsequent cases—but as far as I can see, it has no bearing whatever on this subject. It was founded upon the doctrine of Britton, with respect to the lands accruing to one manor, and taken off from the other by the violent course of a stream. It did not appear that it was a navigable river—nor was there any allusion to its being navigable—it was nothing more than an adjustment of the rights of ownership and occupation between two persons whose lands were opposite to each other by the side of the river, but whose relative boundaries were occasionally altered by the course of the stream. My only reason for mentioning this case is because it is quoted so unceasingly, as if it had something to do with the subject. 22 Edw. III. Liber Assisarum.

In the 23 Edw. III., the case occurred of the Abbot of Peterborough:—"The Abbot of Peterborough was questioned "at the king's suit for acquiring thirty acres of marsh land "in Gosberkile; the license of the king not having been ob- "tained. The abbot pleaded that by the custom of the country "from time whereof the memory of man was not to the con- "trary, all and singular the lords of the lands of the manors, "and the lands upon the coasts of the sea particularly, had "all the marshes and salt marshes by the flux and reflux of "the sea; and he says that he has a certain manor in that "vill, from whence much land is adjacent to the coasts of "the sea, and he has by the flux and reflux of the sea about "300 acres of marsh land adjacent; and without this that "he himself has acquired," &c. Upon issue joined, it depended many years before it was tried. But afterwards in Easter, 41 Edw. III., judgment was given, that "accord- 23 Edw. III. Abbot of Peterborough.

"ing to the custom of the country, the lords of the manor "near adjacent had the marshes and salt marshes increasing "by the flux and reflux of the tide, and projected towards "their land—*Ideò Abbas sine die.*" The consequence was that he retained his possession over lands which certainly came within the description in the allegation of the Attorney-General's information.

That case, and others which I shall have occasion to quote to your Lordship, all show that in these instances the lords of the manors have enjoyed the sea-shore and possessed it without any regard at all to any prerogative right of the Crown.

Year Book, 34 Edw. III. pl. 11.

In the Year Book also, there was another case in which a considerable quantity of land and *weirs* were recovered as parcel of the manor of Burnham in Essex.

Statutes.

There are also during the reigns which I have been passing over, many *statutes* with regard to *weirs* in different parts of the country. Mr. Bethell referred to one of them, quoted in the Commission of Conservancy. All of those are still free from any mention whatever of any peculiar right of the Crown to the shore, upon which these *weirs* would have been an interference and an intrusion—if the prerogative right now claimed had existed.

43 Edw. III. Abbot of Ramsey.

In the 43 Edw. III. occurred the Abbot of Ramsey's case; —it is stated in this treatise. I do not read the treatise itself as an authority, but I refer to this case which is quoted in it; and is also given by Sir Edward Coke in the Fourth Institute in the chapter on the Court of the Admiralty. He says:—"The case was that the Abbot of "Ramsey was seised of the manor of Brancaster in Norfolk "bordering upon the sea, upon sixty acres of marsh of which "manor the sea did flow and reflow; and yet it was adjudged "*parcel* of the abbot's manor, and by consequence within the "body of the county unto the low water mark." I will read also another passage from Sir Edward Coke, which relates to a subsequent period. "It was adjudged in the 17 Eliz., in

Diggs v. Hamond.

"the Exchequer, Diggs informing for the Queen, that the "land between the flowing and reflowing of the sea belonged

" to the lord of the manor adjoining, as the Lord Dier doth " there report." Judgment against the Crown.

In the sixth year of Richard II. there is a case which is frequently quoted; and a dictum which is supposed to bear upon the subject; but of which I must say I cannot see the applicability. It is with respect to an application for protection; and in the course of the discussion, Belknap refused the grant of the protection, because he said, "The sea "is of the ligeance of the king, as of his crown of England." That has been quoted for the purpose of showing that the king is entitled to the sea; and by an odd mode of reasoning, because the king is entitled to the sea, he is argued to be entitled also to all the land over which the sea flows. But in truth this was nothing more than an application for a protection, to which the answer was, What is the protection wanted for? You are not out of the protection of the king on the sea. You do not want any protection for that purpose, because you are still in the ligeance of the king as of his crown of England. My Lord, this case is actually brought in for the purpose of supporting the alleged doctrine; and is quoted by some of the authors as the foundation of the King's prerogative. 6 Richard II.

In a statute in the 2nd of Henry VI. certain *weirs* on the river Thames are mentioned, and commissioners are appointed for the parts which were beyond the liberties of London. The Lord Mayor of London having the undoubted conservancy *jurisdiction* as to all *weirs* within the liberties of London, an Act of Parliament was passed to give the same power to other commissioners beyond the liberties of London. In that Act the right of the owners (as in the instance of *Magna Charta* before mentioned) is expressly reserved; but there is no reservation of any right whatever in the Crown. Stat. 2 Hen. VI. ch. 9.

In the eighth year of Edward IV. in the Year Book will be found a case in which fishermen were proceeded against as trespassers on the shore for digging holes to put stakes in for drying their nets. They pleaded a custom that they had used to go there to dry their nets. It was held that was bad, because "there could be no custom to dig *my* land although the 8 Edw. IV. fo. 18, 19.

"sea flow over it," and "that it was a destruction of the in-"heritance." That is a declaration of Chief-Justice Choke. But in that case again there is no reference whatever to any right of the Crown. An action was brought by the lord of the manor against those fishermen for trespassing upon his ground, and the words of the judgment are, "There could be "no custom to dig *my* land,"—evidently treating it as the land of the plaintiff, who succeeded in the action.

Year Book, 8 Ed. IV.

In the same Year Book, in the same reign, there is also another action of trespass for digging on the coast of the sea. The plea justified for erections as defences against the King's enemies; but it was held bad. There again there was no right of the Crown brought forward, which of course would have been done, if the King was entitled to the shore, and those defences were put there. The lord of the manor however prohibits it, and brings an action. It is pleaded that they are defences for the protection of the country against the enemy, which would have prevailed if it had been set up under the authority of the *King* upon the *King's* own land.

Abridgements.

My Lord, I have already adverted to the fact, (and therefore will not trouble your Lordship with it any further) that at this period of our legal history the *Abridgements* begin. *Statham's* Abridgement is in the reign of Edward IV.: and *Fitzherbert's* in the reign of Henry VIII. Now during that time, as I have observed before, there is no trace of this doctrine. My Lord, the learned author of the Abridgement which I have last named was also the author of the well-known *Natura Brevium*, to which I am obliged to refer.

*Lord Chancellor.*—It does not appear to me how this, being a general question, can be in issue now. The information says that the Crown is seised of the bed of the river, and upon that they rest part of their case. I do not see that that depends at all upon the general right of the Crown—it leaves it entirely open. They say, as to the particular bed of the river, the Crown is seised. *It may ultimately become a very material question,* when you come to try the right; and I may direct an issue to try the point as to the allegation of the information, that the Crown is seised of the bed of the river,

met by a denial of that right, and an assertion of the right of the Defendants. As matter of pleading, *not saying what the ultimate right may be,* how am I now to determine upon the general right of the Crown?

*Mr. Serjeant Merewether.*—My Lord, as far as the pleading goes, it is quite clear that there is an assertion of seisin on the one hand, and a denial of it on the other. You are not seised, we are:—that is the matter certainly to be tried in the cause, a matter of fact to be inquired into:—but I am now speaking of the proposition of law, my Lord, which precedes that allegation; and upon which the whole is founded—namely the prerogative right of the Crown.

*Lord Chancellor.*—That does not enter into it at all. Whatever the prerogative of the Crown may be with respect to other places, they do not give any opinion; but they say, As to the particular soil of the Thames we deny the right of the Crown, and assert the right of the Corporation; therefore the general prerogative in support of the Crown's right is not in issue. The question is, whether this matter now in discussion is raised by the answer, so as to make it necessary to decide it, in deciding whether the Defendants are to answer the question. Take the pleadings as they stand—take the answer as it stands—I want to be informed how it is that this general question is raised between the parties, the answer not denying, nor asserting, not admitting, the *general* right, but saying as to the *particular* right in question, I deny that that is in the Crown. The general question is not raised in these pleadings at all—I wish to draw your attention to this fact.

*Mr. Serjeant Merewether.*—The Crown, your Lordship sees, asserts this prerogative, and it is the point upon which the exceptions rest.

*Lord Chancellor.*—The Defendant does not take issue upon that.

*Mr. Serjeant Merewether.*—There could be no issue taken upon that, my Lord—it is a proposition of law.

*Lord Chancellor.*—Then if there is not, it is no question upon the discovery.

*Mr. Serjeant Merewether.*—It is submitted to the Court, my Lord, by the answer:—as a proposition of law should be.

*Lord Chancellor.*—The *Crown may not have that general right*; but there may be something peculiar in this case to show that it has a right in the bed of the Thames.

*Mr. Randall.*—The Attorney-General by this information, my Lord, does not allege that the Crown has any peculiar title, but he puts it upon the general prerogative title.

*Lord Chancellor*—Then why does not the answer? It is clear enough upon the information that the discovery must be made; the question is raised upon the answer. The Defendants have set up an adverse title—the discovery sought relates to that adverse title, and not to the title of the Crown. That is the ground of the discovery. If that is so, that is as to the particular subject-matter. The answer does not deny the prerogative, and therefore deny the title; it denies the title altogether.

*Mr. Serjeant Merewether.—If your Lordship can be satisfied that the Crown has no such prerogative right as is asserted, how can this suit be maintained at all?*

*Lord Chancellor.*—That is not the question for discovery.

*Mr. Serjeant Merewether.*—If the suit could not be maintained, how could the Crown, as altogether a stranger, be entitled to call upon us to disclose our title, we being in possession?

*Lord Chancellor.*—It has a right to discovery from you in aid of its title, if it is not protected by some rule.

*Mr. Serjeant Merewether.*—The proceedings in this case, my Lord, are so extremely expensive both to the Crown and the Corporation, and give so much trouble to all parties concerned, that I imagine it would be as much to the interest of the Crown as of the Corporation of London, that this, which is *the material point in the case,* should be settled.

*Lord Chancellor.*—I am no party to that agreement; *you may raise the question if you like*; after all it will be a decision not binding upon anybody, as it is not necessary for the purpose; if the decision as to the answer does not depend

upon the question of the general prerogative, then whatever opinion might afterwards be expressed, would not be a decision upon the point at all. I am only throwing this out—it may be very material to the Crown no doubt—*it may be the foundation of their case*; but the Defendant does not put it upon that: on the contrary, he says, I have nothing to do with the general right—that is a matter of law; but I say, with regard to this particular question, I deny your right; the seisin in the Crown is denied, and an adverse seisin alleged in the Defendant.

*Mr. Serjeant Merewether.*—This first proposition is an earlier point in the case than that.

*Lord Chancellor.*—That is not the proposition which the Defendant meets; he meets it by a mere general denial of the Crown's right, whether supported by the prerogative or not; he denies the right, and asserts an adverse right of seisin in himself; that is the question between the parties. You are actually, under a question of this sort, trying a particular right, upon which the Crown may or may not rely (*in all probability it will of course*) in support of its claim.

*Mr. Serjeant Merewether.*—Surely, looking at the pleadings, the *information having alleged this so distinctly at the commencement, as the ground upon which the Attorney-General puts it*; and the Answer having denied it, and left it as a proposition of law for the judgment of the Court, it must be decided——

*Lord Chancellor.*—Not as to this land—the general prerogative no doubt.

*Mr. Serjeant Merewether.*—The Master of the Rolls having given his judgment upon this very point:—and when I look at the exceptions which bring us here, I find that the principal point there is, that we do not show the charter on which we claim this property from the Crown, to show how it is out of the Crown,—it does seem to me that the very essence of that proposition is, that by some right or other it is in the Crown: then the right which is alleged is, that *by royal prerogative the Crown is entitled to the sea-shore all round the kingdom.* How that matter can be passed by, I do not very well see.

*Lord Chancellor.*—As I collect the answer, the proposition is not raised in that way. It is not that you rely upon a charter giving you the right, and that on that they ask for a discovery; but they say, that you have shown such a right as in point of fact shows the plaintiff's right.

*Mr. Serjeant Merewether.*—If this were a case between private individuals, and supposing the party complaining alleged his title on the face of the bill, and it was afterwards, upon our putting in an answer, said, But you do not show by what deed you have derived the title from us: is it not open on that state of things to say, You have *no title* at all—you are *a stranger*? My argument is with a view of showing, that *the Crown is altogether a* STRANGER *to this possession—that it has no right at all; that the right which is set out in the beginning of the information has no foundation in law;* therefore our not showing that we have any title derived from the Crown, is not any ground for calling for a discovery from us; if your Lordship has a decided opinion upon that point, so that I might not with propriety press the matter further before your Lordship——

*Lord Chancellor.*—I throw it out for your consideration: you must exercise your own discretion about it; it is a difficulty which, no doubt, you have in the case.

*Mr. Serjeant Merewether.*—My Lord, I certainly should not have brought myself before your Lordship at all on this occasion, if it had not been from *a thorough conviction of the extreme importance of this matter to this suit;* and thinking also that the pleadings were such that *this must be decided in some way or other* before the disposal of the exceptions, and the judgment of the Master of the Rolls upon them. Being entrusted with the records of the Corporation, I am bound to resist the production of anything which would tend in any degree whatever to discover the title of the Corporation.

*Lord Chancellor.*—I cannot go any further than to suggest what exists in my mind as a difficulty.

*Mr. Serjeant Merewether.*—The further observations which I have to make to your Lordship will be for the purpose of

showing *the period when this doctrine arose; and that it has no foundation in law.*

I am now, rather tediously I fear, going through the negative part of the case; but when I come to the other part, to show who were the authors of this doctrine—how it was attempted to be introduced—and how, when introduced, it was abandoned—how the charters granted in consequence of its assumption have been unavailing, and have been held by the Courts to be void—I think I shall make such an impression on your Lordship's mind as will lead you to the conclusion that *there is no such prerogative as that which is now claimed.*

*Lord Chancellor.*—What I have said, I have merely thrown out for your guidance.

*Mr. Serjeant Merewether.*—I am extremely obliged to your Lordship. I will avail myself of your Lordship's permission, by going through the remaining portions of my statement as speedily as possible. The case to which I am now about to call your Lordship's attention is Sir John Constable's*. He was possessed of the lordship of Holderness, with the *wreck* from the sea *within* the manor; he brought an action for this wreck:—the grant under which he took is given at great length —and there are no special words giving him the *shore,* but simply the *wreck.* Now, my Lord, it is truly said that the sea-shore being a prerogative right, it could not pass out of the Crown without express words; therefore the word "wreck" only being used, and there being no express mention of the sea-shore, the decision that Sir John was entitled to that wreck, as being within his manor, is a decisive proof to show that the shore is a part of the manor, because the grant is "Wrecca infrà Manerium."—That occurred in Sir John Constable's case; there is no judgment of the Court printed. But at a subsequent time, 43 Eliz., his son *Sir Henry Constable,* in a case reported at great length in the 5th Rep. 106, brought an action of trespass for the same cause, and after much discussion and full consideration, it was decided that he was entitled to the wreck, because it was assumed that the wreck must be on the sea-shore, and therefore he was en-

Sir John Constable's case. 19 Eliz.

Sir Henry Constable's case. 43 Eliz.

* Anderson, p. 86; 19 Eliz.

titled to it as infrà Manerium:—showing the sea-shore to be *parcel* of the manor. Those cases have ever since been treated as authority. When the Attorney-General, on a recent occasion, set up this prerogative, he was reminded of Constable's case;—and the Court said to him expressly, "If you are right, "Mr. Attorney-General, Sir Henry Constable's case is wrong." The Attorney-General set up the prerogative right of the Crown; and contended that no evidence could be received to explain a grant in general words; but that there must be a grant in special words of this prerogative right. Those cases therefore have been thought to be binding authorities, and have been much relied upon in reference to this subject. I will therefore, my Lord, not trouble you any farther with respect to the many cases which will be found where the right to the sea-shore was enjoyed by the lords of the manor and the owners of lands adjoining the sea-shore; about sixteen or seventeen of those actions were maintained for such a right without any interposition of the Crown.

Jas. I.

My Lord, I have now arrived at that period of our legal history when undoubtedly this doctrine seems to have been introduced—it was in the reign of James I.; and there are then some traces from which inferences have been drawn that the Crown has such a title.

8 Jas. I. Banne case.

In *Davies's Reports** there is the well-known case of the *Banne* fishery, which has been supposed to support such a doctrine; but when it is looked into, my Lord, in point of fact it affords no inference of the kind; there is an observation in the course of it which looks that way, but the case was simply this:—The Crown by right of conquest being in possession of the land and territory immediately on the river *Banne*, had made a grant of some of that land to a person who claimed in consequence of it the fishery in the river; and the whole point decided in that case was, that under the general words granting the land, the fishery did not pass: however it was stated that there was some right in the Crown, and there are authorities quoted in the margin for it. These authorities I have already gone through—Britton and other authorities—

* Page 149.

which, upon looking carefully into them, do not really bear out the proposition.

Shortly after that time, there is a case in *Noy*, in which the Court says, upon a diversion in the river Thames, that there should be a writ of ad quod damnum, *or a patent*. That is the first loose hint which I find of any right being supposed to be vested in the Crown—it was in fact a case of *purpresture*; and consequently does not support the private right in the Crown which is now set up.

Then, my Lord, succeeds *Callis*, a book supposed to be of authority. He was the Reader of Gray's Inn, and has certainly taken upon himself in his book to allege this prerogative right; but upon looking to the authorities which he quotes, it will be found that none support him in his position. He quotes the same authorities as are in the margin of the Banne case; but not one upon which any reliance can be placed. I am sure I shall not have occasion to urge to your Lordship that the mere authority of a Text writer of that description, unless founded upon some decided case, cannot prevail.

Very soon after this time, charters began to be granted conveying the shore of the sea; and in the fourth year of Charles I. there was a charter granted to the *De Wandesfordes*, of the whole of the sea-shore; giving in the most extensive words all fisheries, marshes, lakes, mud-lands, oozes, and all wrecks, and all belonging to the sea as far as the tide flowed and reflowed. That charter was brought in question in the case of the *Attorney-General* v. *Parmeter*, with respect to the harbour of Portsmouth; but upon its being produced and relied upon, it was stated that there had been no act done upon it whatever, and it never had been put in use; nor was that to be wondered at, because there were at that time parties entitled to that coast, and the sea-shore adjoining it: and in actual possession of it at the time of the grant, and have so continued ever since. The Duke of Norfolk, and many others all round Hayling Island and Langston Harbour (where there are large districts of mud-land and ooze and sea-shore), were 1629. 4 Car. I.

in possession of them when this charter was granted. The moment that charter saw light in a court of justice, it was held to be void, and so treated.

As might be expected, this prerogative right being thus suggested, a case followed with respect to the river Thames, against *Philpot* and others; in which the Crown laid its claim to a considerable quantity of the shore as a purpresture, at the outside of Wapping Wall, on the north of the river Thames; and it procured a judgment.

1633. 8 Car. I.

*Mr. Solicitor-General.*—Where is that case?

*Mr. Serjeant Merewether.*—It is not reported; and I believe has never been acted upon. It is mentioned in the treatise *De Jure Maris* thus:—"Consonant to this there was "a decree Paschæ Car. I. in the Exchequer entered in the "Book of Orders of that term, folio sixty-six, whereby it "was decreed that the soil and ground lying between Wap-"ping Wall and the river of Thames is *parcel of the Port of* "*London*, and therefore and for that the same lies between "the high-water and low-water marks of the river of Thames, "all the houses built between the Hermitage Wharf and "Dickshore eastward, and between the old wall of Wapping "Wall on the north and the river of Thames on the south, "are decreed for the king, and the same were accordingly "seized into the king's hands." Now, my Lord, it is right that I should mention that case: but whenever it may be attempted to be cited as an authority, and the circumstances connected with it are looked into, I am sure it will not in this day be acted upon; as I believe it never has been; at least, if acted upon, it was disputed and called in question, and the proceedings under it were inch by inch fought by the Corporation of London. At that time, it is well known as a matter of history, the coffers of the Crown were not full; and it was desirable that proceedings of this kind should take place *for the improvement of the king's revenue**; and accordingly it will be found, when that case is looked into, that the Lord High Treasurer and the Chancellor of the Ex-

* It is so stated in the proceedings.

chequer sat with the learned Judges upon the Bench, and were present at the decision of that case. I think I may say with confidence, that case will not be relied upon.

*Mr. Solicitor-General.*—It is very possible.

*Mr. Serjeant Merewether.*—I shall be very glad if that case is relied upon, that the circumstances of it should be gone into; there are facts connected with it, which I think will be amusing and instructive to my learned friend, whenever he thinks fit to enter upon them. I do not find that case anywhere quoted, excepting upon one occasion; in Whitaker *v.* Wise, Keble's Reports, 759; where it is said by the reporter at the end of his report, "That case was decided against Sir "Henry Constable's." I think therefore neither in law, nor in fact, will my learned friend be able to make anything of that case, so soon afterwards repudiated, when brought under consideration.

There is in the 22 Charles I. a case which I think is almost decisive, that this doctrine was not adopted as a known point of law at that time. It is a short note—and mentions only a part of the proceedings; but there is sufficient to show that it occurred at a *Trial at Bar*. It is the case of *Johnson* v. *Barrett*, Aleyn's Reports, page 10. It related to a wharf at Yarmouth; the owner of which brought an action against the corporation for removing his wharf, it being supposed to be a nuisance to the harbour. In the course of the trial, as Aleyn reports, on its being asked to whom the land would belong if the wharf was removed, Rolle, counsel on one side, stated that "if it were above low-water it belonged to the owner of the "adjoining land." But Hale, who was counsel on the other side, strenuously denied this, and said it was in the king. "But it was agreed that if it were below low-water mark, it "was in the Crown." Now I think it is hardly possible for any one to say that at that time it could be considered the law of this land, that "by the Royal prerogative, the ground "and soil of the coasts and shores of the sea round this "kingdom, and the ground and soil of every port and haven, "and every navigable river into which the sea ebbs and flows,

1647. 22 Car. I.

Johnson *v.* Barrett.

"belonged to His Majesty." If so, the answer at the trial at bar would have been at once clear and plain, and it must have been instantly stated and assented to. Philpot's case would have been cited, if indeed anybody had had hardihood enough to do it—and you would probably have had this case of *Johnson v. Barrett* quoted by Hale, if Lord Hale was really the author of the treatise as asserted;—Lord Hale himself being the counsel who stated that point in court. But neither is Johnson and Barrett quoted, nor any reference to it made in this treatise:—so that if it is Lord Hale's compilation, it must be inferred that Johnson and Barrett was decided against his doctrine.

My Lord, this treatise, as far as it goes, is directly against the last proposition, that "if it were below low-water mark it "was in the Crown,"—because the book shows that weirs, which are generally below low-water mark, may belong to the owners of the adjoining land, which gives them a right beyond the mere line of low-water mark: as Magna Charta also seems to assume.

1663. 15 Car. II. Bulstrode v. Hall.

Perhaps my learned friend will expect that in candour I should also refer to the case of *Bulstrode* v. *Hall*, Siderfin's Reports, 148, respecting some property at Blackwall; and where this note is inserted by the reporter: "In this case it "was oftentimes affirmed and not denied, that the soil of all "rivers, so far as the flux and reflux of the sea, is in the king "and not in the lords of the manors, except by prescription." Now I imagine, my Lord, that is the first distinct assertion of this doctrine now so much relied upon: it is a note of the reporter—not at all in the manner, as if it were the acknowledged law of the land; but rather as one of the new notabilia, which he thought it was right to put down in his note-book. And it can easily be accounted for, that it was alleged on the one side and not denied on the other, because it might have been admitted by both; as was the fact in a subsequent case, with respect to the Portsmouth Harbour, to which I drew your Lordship's attention before; where exactly the same took place. There it was admitted by the counsel on both sides, that the right did exist in the Crown:—but for the most obvious

reason—that both parties *claimed* under the Crown. One party claimed under the Crown by that charter, which I have mentioned before to the De Wandesfords,—and the other claimed under the Crown by the general title—of course therefore the Crown's right was not disputed in that case. Such might have been the fact in Bulstrode *v.* Hall. But at all events it can never be said that this was stated in such a manner by this reporter, whatever his credit might have been, as to induce any one to believe that this prerogative right (which if it existed at all, must have existed from the earliest time) was then acknowledged law.

In the same reign there was the important case of *Trematon*; and there have been more modern cases to the same point. That case related to the port and water of *Sutton Pool* at Plymouth, which was held, after seven years' evidence, to have passed as pertinent to the manor of Trematon. There was no special mention of the water in the grant; and it is said in this treatise that the water passed (not by any prerogative right), "but it passed by strength of its being parcel of and appendant "to the manor." Now this, my Lord, is a matter of great importance:—because the Duchy of Cornwall would afford a full opportunity of sifting and testing this prerogative right. In a subsequent case, an information was filed against Sir John St. Aubyn by the Attorney-General of the Duchy of Cornwall, for an encroachment upon the sea-shore at Devonport:—after a long trial and much discussion, it was at length found in favour of the lessee of the Duchy of Cornwall and against Sir John St. Aubyn; *not upon any prerogative right belonging to the duke or to the Crown,* but because the sea-shore belonged to the Duke of Cornwall as "*part and parcel of the manor of* "*Trematon.*" The same was held in this case to which I was just before drawing your Lordship's attention; and also in a subsequent case with respect to Plymouth Harbour; and it is clear law that the sea-shore of those places belongs to the Duke of Cornwall, as *appurtenant to his manor* there, and *not by any prerogative right.* If the Attorney-General therefore sets up a prerogative right, a question must immediately

1664. 16 Car. II. Trematon Case.

occur between the Crown and the Duke of Cornwall: for it is clear law that such a right in the Crown cannot pass but by express words;—and there are no such express words in the charter which gives the Duchy of Cornwall to the Prince of Wales.—The charter is given at length in 3 Manning and Ryland's Reports, in the Appendix to Rowe *v.* Brenton.

Rowe *v.* Brenton.

*De Jure Maris.*

I have already referred your Lordship to the treatise *De Jure Maris.* I have made some observations upon it, and I am anxious not to trespass unnecessarily upon your time, therefore I will not repeat them; but I think I am justified in saying that if that treatise is examined carefully, it will be found, both from intrinsic as well as extrinsic circumstances, not to be entitled to the name which it has so long borne. I believe it is not Lord Hale's work: which may be justly tested by its intrinsic merits. There are some cases in it which seem accurately and well stated; but there are others which are contradictory to each other, and are perverted:—nevertheless this treatise has always been the authority referred to for the support of the doctrine I am now disputing.

Abridgements.

I will not trouble your Lordship with any observations upon the subsequent *Abridgements,* which have certainly added to the former works of that class: the former Abridgements, of Statham and Fitzherbert and Rolle, are all of them free from any assertion of this prerogative right as I have already stated; but Comyn's Abridgement, Bacon's Abridgement, and Viner's Abridgement, all of them state it. However, I have gone through the authorities which they quote for it, and none of them support it; it is merely a statement made in those works without authority.

Blackstone.

I must make one observation upon Blackstone's Commentaries—a book very likely to have promoted that general impression in the law, which has been entertained in modern times; for as we all read that book early in life, and imbibe its contents greedily and implicitly, so also we retain them long. This book therefore, from its style and composition and general use, is likely to have produced an effect upon the minds of most lawyers. Blackstone lays it down clearly and

distinctly, that the shores belong to the king. But when you look at the authority he quotes for it, it is in fact a reference to the Commission of Sewers—he cites Fitzherbert's Natura Brevium, 149: which is nothing more than a transcript of the recital of the Commission of Sewers, in which it is alleged that inasmuch as His Majesty is bound to protect the country from foreign enemies, so is he also bound to protect the shores from the aggression of the sea. How so learned an author could have imagined that he was justified, from such an authority, in making such an assertion, I must confess I cannot explain.

I will not trouble your Lordship with a reference to a case, in which Mr. Justice Buller* quoted *obitèr* a passage on this subject; it is clear that he merely quoted from the treatise. But I hold in my hand the notes on the first Institute, by Mr. Butler, who was the colleague (if I may use the expression) of Mr. Hargrave, and the note, a portion of which I am about to read, is the writing of Mr. Butler. Probably it is not to be wondered at that Mr. Butler, who was so connected with Mr. Hargrave, should adopt the doctrine of the manuscript he had published. He says (quoting in fact the treatise):—"This being premised with respect to the "propriety or ownership of the sea and its soil, it may be con- "sidered under these three distinct divisions, the high seas, "the shore, or the land between high-water mark and low- "water mark, and the soil and franchise of ports.

Butler's Notes. Co. Litt.

"As to the high seas and their soil, the right of fishing in "the sea and its creeks and arms is originally lodged in the "Crown, as the right of depasturing is originally lodged in "the owner of the waste whereof he is lord; the king has "therefore of common right the primary right of fishing."—(I think it would be difficult to support that by authority.)—"Yet "the people of England have also, by common right, a liberty "of fishing in the sea and its creeks or arms, as a public com- "mon of piscary; yet in some cases the king may enjoy a pro- "priety exclusive of their common of piscary. He also may

* In Rex v. Smith—Doug. 441.

"grant it to a subject, and consequently a subject may be "entitled to it by prescription.

"As to the soil between high-water mark and low-water "mark at ordinary tides, this of common right belongs to the "king. It *may* however belong to a subject by grant or "prescription." Then he refers (which is contrary to the position he lays down) to Sir Henry Constable's case*: —and he states further also that "wreck may be parcel of a "manor!" Now there certainly can be no ground for such a proposition. Though I should speak with great respect of Mr. Butler's opinion, I cannot but think that on this occasion he was misled. A person of such authority as Mr. Hargrave having published such a manuscript, as if written by Lord Hale, too many, like Mr. Butler, would be willing to take the doctrine on the authority of Lord Hale, without considering the foundation on which it really rests.

54 Geo. III. c. 159.

My Lord, there is an Act of Parliament which seems to bear upon this subject—the 54 Geo. III. c. 159—which authorizes the Admiralty to do certain acts upon the sea-shore, with the view of prohibiting sand and other things being improperly taken away from it; but there is a proviso, "That nothing "in this Act shall abridge, diminish, or take away, any *rights* "*of property or ownership* which any lord of a manor, *or other* "*person*, may have on any port, or the banks, shores, and sides "thereof:"—and there being no reservation of the right of the Crown in that Act, it seems to go far as a legislative admission upon the point, that the subject is entitled to it as belonging to the land; and that the Crown is not.

For the reason which I have stated before, I will not weary your Lordship by a minute reference to those cases in which the rights of the lord of the manor have been established; but I would state shortly that in the case of *Brooke v. Spering*, the right of the lord of the manor to the shores of Sheppy Island was upheld. In *Lord Grosvenor's case*, which occurred as to

* It is obvious that Mr. Butler was led into this error by the treatise, which he implicitly followed: and in which Sir Henry Constable's case is quoted to support doctrine directly the reverse of the point settled by it.

the river Thames, Lord Tenterden refers to the right of the soil in the City of London. Then in *Blundell* v. *Catterall**, which was a question with respect to the right of bathing on the sea-shore; the inhabitants set up such a right, but the lord of the manor resisted it; the right of the lord of the manor was maintained:—and there was no reference to any right in the Crown. *Chad* v. *Tilsed*† is a case, my Lord, of considerable importance, because it is entirely consistent with the late case of the Duke of Beaufort, to which I before alluded, and which I think your Lordship will find to bear strongly on this point. Chad *v.* Tilsed was an action of trespass, brought by the owner of Brownsea Island in the Harbour of Poole, and a verdict was given for him:—the trespass being committed upon the sea-shore. The right of the plaintiff to recover was made out under a charter, which was produced, and also by acts of ownership by the lord; and those acts of ownership were held to be conclusive evidence of the right of the lord, without producing any grant by express words from the Crown; which is most material with reference to the doctrine I have before mentioned, that a prerogative right (if it really exists in the Crown) cannot pass from it but by express words—Mr. Justice Richardson saying, "It was quite "clear that an individual might maintain a *right to such soil*, "by *usage*, independently of a grant." Now this case, my Lord, was cited in the very recent case of the *Duke of Beaufort*. —I pass over with a mere mention a case of the same description—*Gray* v. *Bond*‡, giving the right to the lord of the manor —and come to *Dickens* v. *Shaw*, at Brighton, with respect to taking sand from the shore:—there the case was also between the lord of the manor and the inhabitants of the town, but there was no interposition whatever by the Crown: and in the course of that case Mr. Justice Bayley (probably as much acquainted with this subject as any person could be) stated

Chad *v.* Tilsed.

* 5 Bar. and Ald. 268. † 2 Brod. and Bing. 403.

‡ 2 Brod. and Bing. 403. And Oxenden *v.* Palmer, MS., Kent, Herne Bay. The lord of the manor recovered against a surveyor of the roads for taking stones from the shore to mend the roads.

that "as far as the Crown was concerned, the Crown had no "beneficial right in the soil; it had only a right for the pro- "tection of the public:"—which if your Lordship will allow me to call your recollection to what I stated at the commencement of my argument, is just the point upon which I rest. I say the Crown has certain rights on the sea-shore,—the rights of dominion as alleged in the Information—the rights of jurisdiction by the Admiralty courts and by the common law courts,—and the duty to take care of the sea-shore for the purpose of navigation, and for the public use, as far as the public are entitled. To this extent the Crown has rights and duties:—but no beneficial interest—no right of private property—no right to take the fruits of the sea-shore:—which as my learned friend Mr. Bethell most properly put it, would be the case in effect, directly or indirectly, notwithstanding the arrangement which has been made that the Crown shall have its revenue out of the Consolidated Fund, and the hereditary revenues shall be in the administrations of the Woods and Forests:—still, directly or indirectly, this is a claim of private right in the Crown, and to the Crown would go the profits which would be derived by the establishment of this proposition.

In *Scratton* v. *Brown**, the lord of the manor established his right expressly to the shore on the coast of Essex.

Benest *v.* Pipon.

My Lord, there is a case of *Benest v. Pipon,* which was tried in Jersey, and eventually brought before the Privy Council, where Lord Wynford gave the judgment. He said "that occupation was the foundation of most of the rights "of property in land," and spoke of "that portion of the "shore which was capable of being usefully occupied;" and he laid down, that "what never has had an individual "owner, belongs to the sovereign in whose kingdom it is; "whatever any sovereign has allowed an individual to possess "or improve, he cannot take away, because he would be taking "from the occupant the value of the labour expended on it." Considering that this claim extends over the whole shore

* 4 Bar. and Cres. 485.

of the kingdom;—and that immense sums have been laid out by parties in improving their property by erections upon the sea-shore, to make it convenient for the purposes of commerce and trade—to require that all those improvements should be put at the mercy of this prerogative of the Crown, is a most formidable doctrine!—particularly when we must remember that much of this property has been made the subject of grants, of marriage settlements, mortgages, and other securities of that kind:—that those arrangements should be interfered with by a principle of this sort, when there are none but modern instances to support such a doctrine, or to show that such a right has ever been exercised, is, I repeat, an alarming proposition.

Modern instances.

These are the observations I have to press upon your Lordship; for with the exception of the case of the river Mersey, and a few cases, comparatively speaking, in the river Humber, where parties, tired of proceedings with the Crown, which never pays costs, consented to take leases at small rents under the Crown—with the exception of those cases, and two within this last year, I believe there is no proof whatever of this prerogative right, extensive as it is alleged to be, ever having been put in force:—and these cases are all within the last eighteen years—I believe I am fully within compass when I say within the last twenty years.

4 A. & E. 384. West Cowes.

A late friend of mine, Mr. Ward of *West Cowes* in the Isle of Wight, was indicted for a nuisance in the river Medina, on the shore; injuring, as it was said, the navigation: but nobody ever dreamt of claiming the soil from him; no right whatever was set up in the Crown; though at that time (as in the Humber) much attention was given to the asserted regalia of the Crown. One can hardly suppose a stronger case than this, in which the Crown did not interfere, if indeed it had really such a title as is alleged.

American Case.

There is an American case* which would bear upon the subject: but perhaps your Lordship would not think it very

* Martin *v.* Waddell, U. S. Rep.

material: though the American law is now certainly considered as of some authority in this country.

'ortland. To the island of *Portland* I may also refer, as rather curiously illustrative of the rights of the Crown. I believe it will be found that in that island Her Majesty is the lady of the manor, and in that character she has used the shore, and has made grants of it, and deals with it as belonging to Her Majesty; but in right of the manor, and not of any prerogative*.

)uke of leaufort's ase. With regard to the case of the *Duke of Beaufort*, to which I was drawing your Lordship's attention, that was an action brought by the Duke of Beaufort against the mayor and corporation of *Swansea*, and was for a trespass upon what had been theretofore a part of the sea-shore. Ships had from time to time lodged their ballast there; by which means the shore had been so much raised and made fit for occupation, that I believe the corporation had formed public walks or something of that description upon it: but the Duke brought an action against them for trespass, in order to try the right to the soil. The Duke it seemed claimed under some deed from the Earl of Warwick, and produced the grant in Court —the grant was read—it contained only general words—it conveyed the *land*—the *terra* and the lordship of the manor of Gower—and nothing further: and it was contended that this sea-shore was parcel of that manor.

Acts of ownership, by his Grace and his predecessors, upon the sea-shore were shown; and were left to the jury for them to say whether they proved or not, that the sea-shore passed under the words "Terra de Gower." A verdict was given for the Duke of Beaufort. The corporation were dissatisfied with that verdict, and they moved in the Court of Exchequer for a new trial. When the rule *Nisi* came on for discussion, the Attorney-General appeared to support the motion for a new trial; and he put the case distinctly upon the ground,

* See the case of Swans at Abbotsbury, in the same neighbourhood:—also the History of Weymouth and its neighbourhood.

that the right to the shore was the prerogative right of the Crown, and that such a prerogative right could not pass out of it but by express words, which were not to be found in this grant. The learned Judge had directed the jury that in his judgment the grant was not sufficient of itself without explanation to carry the sea-shore, or to carry the *locus in quo*; but he said to the jury, "You may take into your consideration all the "acts of ownership done by the Duke of Beaufort and his pre- "decessors, and say upon the whole, whether you are satisfied "or not, that the sea-shore did pass under the grant and was "part and parcel of the manor." The jury gave deliberate answers to all the questions put to them, affirming that it did pass under the grant and that it was part of the manor. But the Attorney-General, when he supported the rule, contending that the sea-shore was the prerogative right of the Crown, said the grant could not convey any right to the shore to the Duke of Beaufort, unless it was by express words; so that of course the evidence of acts of ownership could not give that effect to the grant; and it was put to him distinctly by Mr. Baron Rolfe, "Then, Mr. Attorney, why do you refer "to the evidence at all? because you say, that no possible "evidence could have such an effect: for your proposition is, "that the prerogative right existing in the Crown cannot "pass out of it without express words." Here the Court, consisting of some of the first lawyers in this country, the Lord Chief Baron, Mr. Baron Parke, Mr. Baron Alderson and Mr. Baron Rolfe, concurred unanimously in opinion that the direction of the learned Judge was right, and consequently overruled the position of the Attorney-General, that there was any such prerogative right in the Crown.

My Lord, there are other cases which would bear upon the subject, but I will not trouble you with them.

*Lord Chancellor.*—The Duke of Beaufort's title was not derived directly from the Crown.

*Mr. Serjeant Merewether.*—No, my Lord.

*Mr. Solicitor-General.*—*Yes,* my Lord; the only question in that case was—(I do not think it will be very material upon

this argument),—but the question in that case really was, whether in the grant which came from the Crown, from the Duchy of Lancaster, the extent of the manor did include this part of the shore which was in the harbour of Swansea.

*Mr. Serjeant Merewether.*—I think my learned friend is mistaken, in saying that the duke claimed from the Duchy of Lancaster.

*Mr. Solicitor-General.*—That was the express question, whether the grant included that or not.

*Mr. Serjeant Merewether.*—I am quite sure that if it came from the Crown, directly or indirectly, to the Duke of Beaufort, it came from the Crown, possessed in its *private right,* and not *jure coronæ.* It was originally in a subject, and being seized by the Crown was afterwards granted to Robert de Brios, from whom the present plaintiff derived his title.

*Mr. Solicitor-General.*—It is stated in a report by a gentleman at the bar, "This was an action of trespass, tried be-"fore Mr. Justice Vaughan Williams, for certain erections "made between high- and low-water mark, alleged to belong "to the plaintiff, as passing to him under the general words, "in a grant from the Crown of the Seignory of Gower." The question I believe was, simply whether the words *cum pertinentibus* included this. It came from the Crown.

*Mr. Serjeant Merewether.* — Not from the Crown *jure coronæ.* The Crown may derive from me, or from the learned Solicitor-General, property, which it may hold in its *private right,* and then grant out in the same way as any other private individual; but I believe there is no foundation whatever for saying that in that case the ground which the Duke of Beaufort enjoyed was not the right originally of a private individual, and as such, granted from the Crown to the Duke of Beaufort's predecessors. As to the other statement which the learned Solicitor-General has made, as far as I can follow it, it is exactly what I stated, which is, that the question was, whether the shore did pass under the general words or not; and the Attorney-General, pressing his argument, was re-

minded of *Sir Henry Constable's case**, as being directly contrary to what he urged; which was simply that the prerogative right could not pass without express words. But, said Mr. Baron Parke, "If you are right, Mr. Attorney, Sir Henry "Constable's case is wrong:"—and that case has always been assumed to be an authority.

I therefore submit to your Lordship that this case of the Duke of Beaufort has incidentally decided this point. And if your Lordship will excuse me for one moment, I will just remind you that the nature of my argument has been this:—That up to the period when the Stuarts succeeded to the throne, there is not the slightest pretence or shadow of a case—or document—or record—to show that any such prerogative existed:—that from that period, precedents ought to be taken with the utmost caution:—and I am justified in saying so, by the words of Mr. Baron Wood's judgment† in one of those cases to which I referred your Lordship—the Portsmouth case—I say therefore that from that period precedents must be looked at with suspicion;—not but that there might be in those days decisions sound in law—quoted from time to time—acted upon—and dealt with as law:—and which, whatever the times were, would be regarded as authority.—But if you find at such a period only a text author suggesting this doctrine—without any authority quoted for it—the matter loosely mooted—a sort of *obitèr* argument by the counsel on the one side and the other,—followed up by such a case as the one I have referred to‡—not finding that case afterwards quoted except to be repudiated, by the statement that it was contrary to Constable's case—charters granted by the Crown at that same time pretending to deal with the shore (there was that of the De Wandesfords, to which I have alluded, and

* See before, p. 31.

† "I must say I have not much veneration for precedents taken from the "arbitrary reigns of those monarchs; and I hope I shall not see such prece-"dents revived in this reign; or if they do take a temporary root, they will "soon be eradicated."—Per Wood, B. Attorney-General of the Prince of Wales *v.* Sir John St. Aubyn.—Wightwick's Reports, 184.

‡ Philpot's Case, 8 Car. I. See before, p. 34.

one also relating to part of the shore of Dorset, both however held to be void)—how this doctrine, now revived, can be supported merely upon the authority of Text authors, and the *obitèr* dicta of learned Judges, misled by the treatise published under the name of Lord Hale, but not I think rightly so, I must confess I am at a great loss to understand. I believe my learned friends the Attorney- and Solicitor-General will in vain look through all our books upon the law for a single case which will support this doctrine. I challenge my learned friends to that point:—and when it is remembered that it was the Attorney-General himself who argued the case of the Duke of Beaufort,—and we all know his assiduity, his intelligence and his zeal,—we may be quite sure that he would not have passed by the opportunity of quoting any authority upon the point, if he could with his numerous assistants have found one. The only authority referred to was the case of Sir Henry Constable, which, he was reminded, was directly against him.

With the thorough conviction therefore that *there is no ground in Law for this prerogative right,* I close the argument which I have addressed to your Lordship, to prove that *this right cannot be maintained*; and consequently that we ought not to be required further to answer the Crown on this point: —for *the Crown having no title in itself,* cannot as a *stranger* to this matter *call upon the Defendants to discover the evidence of theirs.*

THE END.

Printed by R. and J. E. Taylor, Red Lion Court, Fleet Street.

## Questions on Mr. Serjeant Stephen's New Commentaries.

8vo, price 10*s.* 6*d.* cloth.

QUESTIONS for LAW STUDENTS on the SECOND EDITION of Mr. SERJEANT STEPHEN'S NEW COMMENTARIES on the LAWS of ENGLAND. By JAMES STEPHEN, Esq., of the Middle Temple, Barrister at Law.

"We have already strongly recommended Mr. Serjeant Stephen's Commentaries. To students who have an earnest desire of reaping the store of learning to be found there, these Questions, which are neatly put and very carefully framed, will be invaluable. There is not a better test of the memory, or greater assistance to those who have not the advantage of an instructor, than answering questions upon what has been previously read; and the student, by properly using them, will find these Questions of great assistance to him in mastering the Commentaries."—*Law Magazine.*

## Oke's Magisterial Synopsis.—Second Edition.

8vo, price 18*s.* cloth.

THE MAGISTERIAL SYNOPSIS; comprising Summary Convictions, the Offences, Penalties, &c., and the Stages of Procedure, *tabularly arranged*; Indictable Offences, where each is Triable, as to Bail, Costs, &c.; and all other Proceedings before Justices out of Sessions, adapted throughout to the Law as consolidated and enacted by the Administration of Justice (or Jervis's) Acts, 11 & 12 Vict. cc. 42, 43, 44, with Forms, Copious Notes and Practical Observations, &c. SECOND EDITION, enlarged and improved. By GEORGE C. OKE, Assistant Clerk to the Newmarket Benches of Justices, Cambridgeshire and Suffolk.

"This is a new and improved edition of a work of very great practical value, for it is in fact as well as in profession a complete view of the whole magisterial duty."—*Morning Herald.*

## Oke's Magisterial Formulist.

Preparing for publication, in one vol. 8vo,

THE MAGISTERIAL FORMULIST, being a Collection of Magisterial Forms and Precedents for practical use in all Matters out of Sessions, adapted to the Outlines of Forms in Jervis's Acts, 11 & 12 Vict. cc. 42, 43, with an Introduction, Explanatory Directions, Variations and Notes brought down to 12 & 13 Vict. By GEORGE C. OKE, Author of "*The Magisterial Synopsis.*"

*** The above work is intended as a Companion to "*Oke's Magisterial Synopsis,*" and may be used with that or other books of Magisterial Practice.

## Oke's Solicitors' Book-Keeping.

8vo, price 5*s.* cloth,

AN IMPROVED SYSTEM of SOLICITORS' BOOK-KEEPING, with Forms of the several Books, a Practical Exemplification of their Working, and Division of Profits and Losses in Cases of Partnership; Directions for Posting, Balancing, &c. By GEORGE C. OKE, Author of "*The Magisterial Synopsis.*"

"Mr. Oke has rendered great service to the profession in compiling the above admirably arranged work. The value and *necessity* of such a work as this to Solicitors is obvious, and we predict for it a speedy sale."—*Law Magazine.*

## Mr. Serjeant Stephen's New Commentaries.

SECOND EDITION.

Four vols. 8vo, price Four Guineas, cloth.

(DEDICATED, BY PERMISSION, TO HER MAJESTY THE QUEEN.)

NEW COMMENTARIES on the LAWS OF ENGLAND, in which are interwoven, under a new and original arrangement of the general subject, all such parts of the work of BLACKSTONE as are applicable to the present times; together with full but compendious expositions of the modern improvements of the law; the original and adopted materials being throughout the work typographically distinguished from each other. By HENRY JOHN STEPHEN, Serjeant at Law. SECOND EDITION. Prepared for the Press by JAMES STEPHEN, Esq., Barrister at Law.

"*The correction of the Work in reference to the new Statutes and Cases, and the revision of the press in general, have been confided by the Author to his Son; his own retirement from professional practice, and the transfer of his attention to official duties, rendering him less competent than formerly to labours of that description. But the sheets have been invariably laid before him during the progress of the printing, and he feels himself able to vouch for their accuracy.*"—Extract from the Author's Advertisement to the present Edition.

"Taking the book" (Stephen) "as a whole, it is the best commentary on a great subject we ever read. Whatever in the former book" (Blackstone) "was important is fully retained and further explained,—what was immaterial is passed by,—what was confused and intricate is made plain,—what was illogical is reduced to reason,—and what was chaotic, to order. The student will reap a rich harvest of knowledge from these volumes; we recommend every member of the profession, be he young or old in it, to read them."—*Law Magazine.*

"This work, now that it has been carried out to the fullest extent, and all the volumes been simultaneously put forth to the world in one entire edition (itself considerably altered by correction and revision from the first), challenges comparison not only with what may be termed 'other editions of Blackstone,' but with Blackstone itself."—*The Times.*

"We must frankly say, preferring upon the whole Serjeant Stephen's writing to Blackstone's, that we think the book before us a somewhat better book than Blackstone's would have been, could that learned judge have survived, with his likings and dislikings, to write in our day. It is a monument of conscientious labour, of diligent and scrupulous care, and of acute professional learning, with a wider scope and range than is common in Westminster Hall."—*The Examiner.*

"We are proud to recognize the merits of a performance which we think will redound to the credit of the authors, while it is eminently calculated to accomplish a destiny which has been hitherto denied to all new 'Blackstones'—that, namely, of *superseding the old one.*"—*The Morning Chronicle.*

"The attempt, we repeat, has been eminently and deservedly successful: for Serjeant Stephen has produced a work which need not fear any comparison which can be made between it and its predecessor (Blackstone's Commentaries), either with respect to style, learning, or general accuracy; whilst we are bound to say, in the philosophical arrangement of the general subject it is decidedly superior."—*The Morning Post.*

---

## Merewether on the Right to the Sea-Shore, &c.

Preparing for Publication, in one vol. 8vo,

A TREATISE on the RIGHT to the SEA-SHORE, and the SHORES of PORTS, HAVENS, and ARMS of the SEA, and of NAVIGABLE *RIVERS*, where the TIDE Ebbs and Flows. By HENRY ALWORTH *MEREWETHER*, Serjeant at Law.